Filed 10/25/16 In re Tony M. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re TONY M., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. JAMIE A., Defendant and Appellant.	A147134 (Alameda County Super. Ct. No. SJ15025348)

Jamie A. appeals from orders of the juvenile court declaring her son, Tony M., a dependent of the juvenile court and removing him from her custody. She contends the evidence does not support the jurisdictional findings or the dispositional order. She also argues the juvenile court failed to ensure proper compliance with the Indian Child Welfare Act (ICWA). We will affirm the jurisdictional order but reverse the dispositional order and remand for further proceedings.

STATEMENT OF THE CASE AND FACTS

On July 31, 2015, the Alameda County Social Services Agency (Agency) filed a petition alleging that Tony, then 20 months old, came within the provisions of Welfare

and Institutions Code section 300, subdivisions (b) and (g).[1] Under subdivision (b), the petition alleged that Tony had suffered, or was a substantial risk of suffering, serious physical harm or illness due to the mother's failure or inability to supervise or protect the child adequately and due to her inability to provide regular care for the child because of her mental illness, developmental disability or substance abuse in that:

b-1: On or about July 26, 2015, Jamie left Tony in the care of his maternal aunt, who was homeless, had a known substance abuse problem and had been recently released from jail; Jamie failed to make her whereabouts known or to make provisions for Tony's care; the aunt contacted the maternal grandmother saying she could not care for Tony, and the grandmother assumed care.

b-2: On or about July 26, the grandmother observed two abrasions on the left side of Tony's forehead, approximately three-fourths to one inch in length, and an "adult palm-sized bruise" on his back; on or about July 28, she discovered the child had lice and treated him; and she was unable to contact Jamie because she did not know where Jamie was between July 26 and July 28.

b-3: Jamie had previously left Tony in the care of various related and unrelated adults who did not provide adequate care and supervision in that after leaving Tony with a paternal great-uncle on July 26, 2015, Jamie saw a bruise on Tony's back that had not been there before and the uncle reported that the child hit his back on the stove while chasing someone; and in July 2015, while staying with a relative, Jamie left in the middle of the night, leaving Tony alone with no adult aware he needed supervision, then returned the next day.

b-4: Jamie had a history of substance abuse and drug-related arrests which interfered with her ability to care for Tony; she entered a residential drug treatment program in 2010 but failed to complete the program, relapsed and was arrested on

[1] Further statutory references will be to the Welfare and Institutions Code unless otherwise specified.

September 28, 2012; and on or about July 4, 2015, while 22 weeks pregnant, Jamie was observed consuming alcohol and behaving erratically.

b-5: Jamie was verbally abusive to the minor and disciplined him inappropriately; was seen kicking Tony once on his side for getting into her purse, causing him to fall on his buttocks; was seen " 'pulling her hand back' " and threatening to strike Tony; yelled and screamed at him and called him "a 'fucking shithead' on a regular basis"; and admitted being verbally abusive to him when feeling stressed.

b-6: Jamie had not had a stable place of abode since June 2015.

The petition additionally alleged under subdivision (b) of section 300 that the father had a history of domestic violence against Jamie and had been arrested on September 20, 2014, after an incident of domestic violence against her in the presence of the minor; and that the father had a history of substance abuse that interfered with his ability to care for the minor. It was alleged under subdivision (g) of section 300 that the child had been left without provision for support in that the father was incarcerated.

Tony had been taken into protective custody by the Fremont police on July 29, 2015. That night, emergency response child care worker Michael Ludden arrived at the home of the maternal grandmother, Shirley A., to find her outside with Tony and maternal great-grandfather Chris M., who lived next door. Shirley reported that on July 27, maternal aunt Jessica A. called saying Jamie had left Tony in her care and she could not care for him. Jessica had just been released from jail and had a substance addiction. Shirley told Jessica to bring Tony to her, and when they arrived, Tony had a small abrasion on his forehead, approximately three-fourths to one inch in length, and a bruise on his back. Ludden asked the Fremont police to assess the situation and the responding officers interviewed Shirley and the great-grandparents, then took Tony into protective custody.

Tony was placed with Shirley, whose home was approved for Emergency Placement on July 30. Tony was reportedly healthy.

Prior to June 2015, Jamie had been living in an apartment in San Leandro, but the landlord did not want to continue the lease and at the time of these proceedings she was

living at the home of her paternal uncle in Hayward and sometimes staying in Fremont with her childhood friend Crystal, at Crystal's mother's house.[2] She and Tony's father had ended their relationship in June 2014. Jamie had a history of substance abuse but maintained that she had not used since before she got pregnant with Tony. Jamie's father had committed suicide in May 2014 and at the time Tony was detained Jamie was struggling with grief, as well as stress over the loss of her housing, ongoing litigation concerning her father's estate, her current unwanted pregnancy and isolation from her family. Jamie's parents were divorced and Jamie was closer to the paternal side of her family; she told the child welfare worker (CWW) that her maternal relatives resented her because she decided to stay close to and live with her father before he died. She characterized her relationship with her mother as "unstable."

Shirley testified at the jurisdiction hearing[3] that she had seen Jamie at least every couple of weeks since Tony was born and took care of Tony for weekends a couple of times a month when Jamie started working a few months after Tony was born. After a year in an apartment in San Leandro, Jamie was now "homeless"—not living on the street, but staying first with Tony's paternal grandmother in Sacramento and then with Jamie's uncle in Hayward. Shirley continued to see Tony a couple of times a month. She believed Jamie had relapsed after her father's death and was again using drugs.

With respect to the allegations in paragraphs b-1 and b-2 of the petition, concerning the July 27 incident, the Agency's reports stated "it was reported" that when brought to Shirley's house, Tony's body, clothes and car seat smelled strongly of dried urine, he had head lice, and he had a bruise on his temple by one of his eyes and an "adult palm-size bruise" on his back. Shirley testified that he was wearing a long-sleeved "onesie" and there was no additional clothing with him. Jessica did not know how he got

[2] Jamie's friend's name is spelled with a "C" in some parts of the record and with a "K" in others. We have adopted one spelling in the interest of consistency.

[3] The jurisdiction hearing was held over several days on October 9 and 14 and November 3, 6 and 9, 2015.

the injuries and Shirley never got an explanation for them. The Agency's report relates that when Jamie was asked about Tony's bruises, she said, " 'I don't know.' "

According to the Agency's reports, Shirley was unable to contact Jamie that night because Jamie did not have a phone, and when Jamie later contacted Shirley, she said she had to " 'run errands' and would be gone for " 'a little while longer.' " Shirley testified that Jamie had not previously asked if Shirley could care for Tony around this time and had not left a phone number where she could be contacted, that she had no way to contact Jamie because Jamie had lost her phone, and that she did not try calling places she thought Jamie might be.[4] The following evening, July 28, Jamie called saying she wanted to pick Tony up; Shirley told her that Tony had lice and directed her to treat herself before coming to get Tony.

The detention report states that Tony was taken into protective custody after the responding officer consulted with his sergeant and was informed that "the safety concern and risk was too high to leave Tony in the care [*sic*] as Ms. Jamie [A.] could return to take Tony into an unsafe situation." Shirley testified that while Child Protective Services (CPS) was at her house, Jamie texted that she was coming to get Tony, and when Shirley told the police this, they said they were going to take him out of the home because if Jamie came, they "had no jurisdiction to be able to keep Tony." Shirley testified, "they were afraid that Jamie would come and pick him up because there was bruises on him and there was reason to believe that there was injuries that weren't sustained by fall . . . you know, by just normal falling based on what the police officer and the [CPS] said that night. The police report, however, states that the " 'small [one-inch] scratch mark' " on the left side of Tony's forehead and "very faint small dime sized 'bruise' " on his back "did not appear to be anything more than when a child falls down while playing." The police report states, "I decided to place JUV into protective custody per [section] 300 due

[4] Shirley did not think Jamie was at her uncle's house because when she called Janelle about Tony having lice, Janelle said Jamie had left "with two guys." Shirley did not know whether Jamie had been living at Crystal's family's house around this time and Jamie had not indicated this was a place she could be reached.

to the fact that we could not get ahold of Jamie to ascertain when she would be returning to pick up JUV." Ludden described the bruise on Tony's back as "faded and oval shaped, diagonal and slightly larger than a quarter," and reported that the family said it was about the same size but darker when they first saw it.

Ludden observed that Tony was a very energetic child who had tantrums when told no or redirected. Shirley said this was new behavior, as was his appearing to be less comfortable with Chris M. than usual. It was also reported that recently Tony seemed uncharacteristically withdrawn and clingy, and cowered when his uncle approached him. Tony appeared to have a strong attachment to Shirley.

According to Jamie, Tony went to Waterworld on July 27 with Jessica and a friend, Megan, whom Jamie thought was a nice person. Jessica had asked to take Tony and Jamie allowed him to go because he loved the water and she knew he would have a lot of fun. Jamie did not go because she had to go to Sacramento to get her father's laptop and court paperwork for his probate. Jamie testified that she was not concerned about the trip to Waterworld but did not want Jessica "running around" with Tony afterward, would not have permitted the trip if Megan had not been going, and would not have let Jessica keep Tony overnight. She directed Jessica to bring Tony directly to the home of the uncle where Jamie and Tony were staying after the water park, or to Shirley's. She testified that Shirley "was okay with" this, although she later testified that she did not tell Shirley the plan.

Jamie testified that Shirley knew where she was on July 27 and 28. Shirley knew Jamie was staying at the uncle's in Hayward because Shirley had driven Jamie there from Sacramento. Jamie had told Jessica she could be reached at her uncle's house and both Jessica and Shirley knew Jamie was going back there when she returned from Sacramento on July 27. Although Jamie did not have a cell phone, she was available

through the telephone of her uncle's girlfriend, Janelle P.,[5] and had talked with Shirley using that phone during the week preceding July 29. At 5:00 a.m. on July 30, Shirley left a voicemail message telling Janelle to let Jamie know Tony was "in CPS." At the hearing, Jamie identified a CD as containing four voicemail messages from Shirley left on Janelle's phone on July 20, 22, 28, and 30. On July 28, Shirley told Jamie to treat herself for lice before coming to pick up Tony, which Jamie did on July 29. Except for July 29, when Shirley did not answer the phone and Jamie left a message saying she was treating her hair, Jamie was in contact with Shirley every day between July 20 and July 30. Jamie denied that "there was no plan" and she "just didn't come back that night of the 27th." Asked if she knew of a reason both Shirley and Jessica would lie, Jamie responded, "Other than the fact that they planned—they tried—they planned to take my son."

Jamie testified that Shirley was critical of "everything" about Jamie's parenting and had twice threatened to call CPS, saying this would help her get custody of Tony. The first time was when Jamie started working in May 2014 and she and Shirley argued about Jamie using different babysitters and not having Tony at a certain day care. The second was in June of 2015, when Shirley did not want Jamie to stay with Tony's paternal grandmother in Sacramento. Jamie testified that Shirley had asked to claim Tony for tax purposes and had claimed Jessica's child for this purpose even though she was not raising him.

Paragraph b-3 of the petition addressed Jamie leaving Tony with other people. On July 26, 2015, Jamie left Tony with her paternal uncle in Fremont and upon returning noticed a bruise on his back. As related in the Agency's report, Jamie said her uncle told her Tony had run backwards into a stove, and had bruised his forehead while playing, and Jamie saw Tony run into a table, resulting in his second head injury. She described Tony

[5] The transcript refers to "Jonell" in recording Jamie's testimony and Jamie described her as her uncle's wife, Janelle P. testified that she is not married to the uncle but in a "long-term romantic relationship" with him.

as "rambunctious." Jamie stated at the jurisdiction hearing that she had come in right after Tony was accidentally hit by a door and fell against the handle to the drawer on the bottom of the stove.

Shirley testified that since May 2014, there had been a few times when Jamie left Tony with her and she did not know when Jamie would return, the most recent being the July 27 incident. Asked about previous times Jamie had left Tony without making a plan for when to pick him up, Shirley testified, "There was a few times, but it's all—because other people would call me because they couldn't get a hold of Jamie or they had Tony." Jamie denied ever leaving Tony alone at night with no adult aware he needed supervision. When Cooper was asked the source of her information that Jamie left Tony alone without advising others in the home that she was leaving, Cooper replied, "family members" and said that at least two such incidents had been reported to her.

Paragraph b-4 of the petition was concerned with Jamie's substance abuse. According to the Agency's reports, the CWW was told at the outset of the case that Jamie had been observed exhibiting "erratic and non-rational behaviors, indicative of relapse on substances," heard making statements like " '[g]o ahead and hurt yourself,' instead of intervening when Tony was doing unsafe behaviors" and heard calling Tony " 'Little Shit.' " The CWW was also told that Jamie had resumed using methamphetamine a year before, was pregnant and planned to give the baby up for adoption, had begun drinking, was " 'doing sexual favors for dope' " and had said the father of her unborn child might be a drug dealer. Shirley testified that she believed Jamie had a substance abuse problem because of "sporadic behavior" and agitation that began in May 2014, when her father committed suicide. Shirley testified that after Jamie's previous substance abuse problems, when she decided to have a baby and got clean, Jamie began looking healthier, gained weight, talked more clearly and became more responsible, but after her father's suicide, Jamie "didn't care anymore" and returned to "old patterns" that Shirley "used to see when [Jamie] was younger when she was going to jail and being arrested for substance abuse."

When Jamie spoke with Ludden and met with Cooper on July 30, the day after Tony was detained, she denied current substance abuse and said she was willing to drug test to prove this. She told them, and later testified, that she had had substance abuse problems from age 19 to 21, spent four months in a residential drug program in 2010 but was evicted for getting into an altercation with another resident, relapsed, abused drugs intermittently and had a drug-related arrest on September 28, 2012, then became clean and sober before getting pregnant with Tony and had not used any substances since the 2012 arrest. She testified that she attended Narcotics Anonymous (NA) meetings about once a month and also sometimes went to "speaker meetings." She had been working on the steps of the NA program since 2012 and was currently on step 10. Asked if she had a relapse prevention plan, she said, "jail. If I do relapse—that's where you go, is jail." Jamie testified that said she had chosen a different way of life since becoming a mother: "When I became a mom I chose to look different, talk different, dress different." Asked what she would do if she felt the need to use drugs again, she replied she would "[g]o to sleep" and, if she felt the need, call her sponsor. She testified that the only alcohol she had had during her pregnancy was on July 4, when she had "four sips" of a beer.

On July 30, Jamie volunteered to submit to a hair follicle test to prove she was not using illicit drugs. Cooper reported that Jamie did not go to Terra Firma, where the CWW had referred her, then said she had done the test at Kaiser and promised to provide the results, but neither did so nor provided releases to allow Cooper to get the results from Kaiser. Jamie testified that she did not want to test at Terra Firma because she had read reports about Terra Firma "changing their results of things" and "didn't want to be one of those cases." She told Cooper this, as well as that she was afraid to talk to Cooper because of what she was reading online.[6] Also, Jamie testified, her former attorney had

[6] Jamie had written a letter to Alameda Social Services that she testified was recommended on a website called "Kid Jacked," which provided a format for parents to follow "to help so that you don't have CPS harassing you." The document contained some statements about Jamie and the father "not having donated [their] child to the State of California" and about the State of California "being a privately held corporation." The

told her the judge would not accept hair follicle tests and she would have to do a urine test. She did a urine test at Kaiser on July 31, which she said was "negative on everything," but she had not given any substance abuse testing results to Cooper because she was scared by things she had been told and read about results being falsified. She would be willing to give results directly to the court.

Cooper stated in the jurisdiction report filed in August 2015, that Jamie "does not appear willing to admit that she may have relapse[d] within recent months," and that she "does admit to using alcohol in July 2015, despite knowledge of her current pregnancy." Cooper testified that initially she was concerned about Jamie actively abusing substances because of the allegations and Jamie's affect at the meeting on July 30, saying she was not using and volunteering to take a hair follicle test, but crying and saying she was willing to enter treatment. By the November jurisdiction hearings, Cooper's concern had lessened and she did not think Jamie was currently using, but she was concerned because of Jamie's extensive past history and statements that she had been in programs before but had not completed them. The report of Jamie consuming alcohol and behaving erratically on July 4, 2015, caused Cooper concern because Cooper did not know if Jamie currently had a substance abuse problem, was concerned about the erratic behavior and could not tell whether Jamie had addressed it.

Paragraph b-6 of the petition alleged that Jamie did not have a stable place of abode. The Agency's reports stated that Jamie told Cooper she had been homeless since June 2015, maternal relatives had allowed Tony to stay at their homes but had not "accommodated" Jamie due to "on-going conflicts," and for a few weeks preceding July 29, Jamie and Tony had been staying with Tony's paternal grandmother in Sacramento and "in Fremont with her paternal uncle," as well as that Jamie admitted the home environment in Sacramento was not "ideal" and probably was where she and Tony

---

father's counsel, joined by Jamie's, objected to the document as irrelevant; county counsel argued she was not relying heavily upon it but believed it was relevant to credibility and was a party statement; the court admitted it, saying it would "give it whatever weight it's due."

contracted lice. Jamie, at the jurisdiction hearing, denied being homeless and testified that she had been living with her uncle in Hayward and in Fremont with Crystal. She testified that she used Crystal's house as her primary residence, where she received mail and kept her paperwork, even when she had her own apartment, because it was "an address that never will change. I've always had that address." After the lease was up on Jamie's apartment in June, she had stayed with Tony's paternal grandmother in Sacramento until July 19, when she needed to be in Santa Clara for probate court. She spent the nights of July 20 to 22 in Fremont, then returned to her uncle's on July 23 and stayed until July 30, when she went to Fremont for an appointment at Kaiser. At the time of the jurisdiction hearing, she was mostly staying at her uncle's and helping run his business; there was room for Tony there and that she could stay as long as she wanted to. She stayed in Fremont when she had medical appointments because Crystal's house was close to Kaiser.

Jamie was on a waiting list for a residential program called Shepherd's Gate, which she wanted to get into because it was comprehensive, including housing, counseling and parenting skills. She testified that she wanted "a new beginning" and they provided the classes, counseling and support she needed. Jamie felt she had gotten "great results" from a one-year shelter program she had done, but when the year was over she was not ready to be on her own, and when she found Shepherd's Gate she believed it was the "answer to [her] prayers." Jamie told Cooper, and testified, that she had to enter Shepherd's Gate either as a family, with Tony, or as an individual; the program would not permit her to enter as an individual and have Tony join her later. Cooper reported that when she contacted the program, she was told there was only one waiting list and Jamie could enter without Tony while attempting to reunify.

Shirley testified that the uncle's house where Jamie was staying was not a safe place for Tony. She believed the uncle with whom Jamie was living (Shirley's brother in law) abused drugs because of his demeanor and because his teeth appeared to have similar characteristics to drug-related dental conditions Shirley had seen in her work for an oral surgeon.

Cooper visited the home just before the last session of the jurisdiction hearing on November 9 and concluded the home was "adequate." The household included two of Jamie's uncles and a 23-year-old grandchild, as well as Jamie's aunt Janelle, who did not live there all the time; when Cooper visited there were other individuals present who Jamie said worked for the family business and a person Jamie said sometimes stayed on weekends. There was a bed for Jamie and the minor in the living room that was "adequate." Jamie's uncle told Cooper Jamie could stay at his home and he "would never put out a pregnant person."[7]

Regarding the allegations of Jamie's abusiveness toward Tony, the subject of paragraph b-5, the Agency reported that Jamie admitted "periodically [being] verbally abusive toward the minor, by calling him a 'shit-head' " but that she stated "any of her other 'erratic behaviors' observed by relatives are exaggerated." At the jurisdiction hearing, Jamie denied being verbally abusive toward or inappropriately disciplining Tony, kicking him, threatening to strike him, striking him, or regularly yelling, screaming and calling him a "fucking shithead." She testified that she did not yell or curse at him or at others in his presence.

The detention report described Jamie having told Cooper at their first meeting on July 30 that she was "emotionally drained" and still grieving from her father's suicide a year before, and that the loss of her housing, an on-going legal battle regarding her father's estate and her current unwanted pregnancy had caused her "undue stress." The jurisdiction/disposition report stated that Jamie acknowledged she could benefit from mental health services as she was suffering from bouts of depression and felt overwhelmed, "especially because she [is] pregnant and wishes to relinquish her baby at birth." Jamie testified at the jurisdiction hearing that she had been very stressed, lately because of "not having my son," and previously because she did not want to stay with

[7] Cooper had testified on November 6 that when she asked about visiting that week, Jamie said that if the case was dismissed, she would not be required to allow Cooper to visit, and that she intended to move to Shepherd's Gate once she got off the wait list.

Tony's grandmother in Sacramento, where it was "too hot" and she believed she and Tony had gotten lice. She was learning to meditate to help reduce her stress. She did not have any mental health diagnosis and had not participated in therapy but had been considering grief counseling since her father's death.

Shirley, asked if she was aware of instances when Jamie seemed incapable of keeping Tony safe, testified that Jamie let Tony run around and did not "watch him the way you should." For example, Shirley had to tell Jamie to hold Tony's hand while they were walking on a busy street. When Jamie was moving out of her apartment, she called Shirley "screaming and crying and telling me she couldn't take care of him anymore, she couldn't stand it anymore, that I better come get him." The way Jamie was talking scared Shirley enough that she went to get Tony immediately, as it sounded like Jamie "just snapped." Shirley had witnessed Jamie yelling at Tony and cursing at him, calling him "a little shit," but had not seen her kick in his direction or hit him. Jamie's frustration with Tony and expressions of feeling overwhelmed began after Jamie's father died and got progressively worse.

Shirley was concerned about Tony's safety in Jamie's care. She testified that she would be supportive of Jamie having regular visits with Tony if they were supervised and of Jamie reunifying once she had received substance abuse treatment. She denied ever telling Jamie she wanted custody of Tony. Asked if she had ever asked to claim Tony as a tax deduction, Shirley responded, "When he was first born because I paid for—I paid for him to be born and I helped support her in the beginning, but not since, no." Shirley was aware that CPS was coming to her house on the night of July 29 and did not indicate to CPS or the police that she was not willing to take care of Tony.

Jamie reported that Tony's father, Jesse M., had been arrested because he choked her while she was holding Tony; she passed out and then Shirley came home. The father was incarcerated at the outset of this case, and indicated that he wished to have contact with Tony upon his release. By October 9, the father had been released from jail and was living with extended family, with domestic violence counseling as a component of his probation. He told Cooper he wanted to have visits with Tony but believed there was a

restraining order in effect, and said his contact with Tony prior to his incarceration had been inconsistent due to his relationship with Jamie.

In the jurisdiction/disposition report filed on August 19, 2015, Cooper stated that Jamie had remained in contact with Tony and the Agency "minimally" and that it was difficult to contact her because the phone numbers she provided changed frequently. Jamie had had two supervised visits with Tony at a park near Shirley's home, which "reportedly went well, despite the mother's insistence that she videotape the visit because she does not trust the maternal relatives." On or about September 1, Shirley told the Cooper she was apprehensive about meeting with Jamie to facilitate visits because Jamie "appeared to express anger and bizarre statements on Facebook regarding the minor" and Shirley feared Jamie might abscond with Tony or become violent toward Shirley. Cooper arranged to personally supervise visits, but Jamie failed to meet on September 9 and 24. On the latter date, Jamie left a voicemail message for Shirley saying she was having transportation trouble and could not see Tony in Fremont, and about 5:43 p.m. Jamie's attorney left Cooper a voicemail message saying Jamie could not make the visit scheduled for 5:30 p.m. Jamie had not communicated with the Agency about visitation or Tony's welfare.

Cooper reported that she received a message from Jamie's former attorney[8] on October 1 providing a contact phone number and mailing address for Jamie. When Cooper called, Jamie sounded distraught and hung up before Cooper could obtain any information about her circumstances. On October 6, Jamie had a supervised visit with Tony at the office of Social Services office in Hayward during which she interacted well with the child. He had trouble separating from her at the end of the visit, then became further upset when Jamie and Shirley were verbally confrontational in his presence. Jamie had requested that Janelle supervise visits; meanwhile the great-grandparents had

[8] Jamie's original attorney was relieved and Jamie briefly sought to represent herself, then reconsidered and new counsel was appointed for her.

agreed to supervise visits at the park on condition that Jamie not be verbally combative with them.

Jamie testified on October 9 that since September 28, whenever she called her mother's house to speak to Tony, whoever answered hung up on her, and she was denied visits for about three weeks when Shirley did not allow her to come to visit Tony, told her to call Cooper to arrange visits and refused to drive Tony to Hayward to see Jamie. Cooper had agreed to help.

Cooper reported that Tony was not deemed safe at home "given the mother's unaddressed substance abuse and mental health issues, the mother's failure to engage in parenting classes, and her lack of stable or adequate housing for herself and the minor," and that he was not safe in the father's care because of the father's history of substance abuse and domestic violence. She testified that she obtained referrals for therapy for Jamie but was unable to present them because she did not know where Jamie was, then acknowledged that she did not give the referrals to Jamie when she was in court on October 2 or October 7. She did not know whether Jamie had a current drug problem.

Asked what risks would be presented if Tony was returned to Jamie's care immediately, Cooper testified that the first would be if Jamie was actively using drugs, "[g]iven mom's possible behaviors, and not being able to adequately supervise Tony." The second risk was whether Jamie could cope with caring for Tony given Jamie's acknowledgment that she was at times "extremely stressed." Cooper was concerned about Jamie's housing situation because when Tony came into care, he "had been with various persons," he had head lice and he was reported to be dirty, and, Cooper stated, "I don't see where that would change." Asked if she felt Tony would be at immediate risk of harm if returned to Jamie's care, Cooper replied, "I don't know." Cooper testified that Jamie had expressed feeling overwhelmed with her own issues and had only just begun counseling, so Cooper had concerns about "the mental health issues with her and dealing with a young child." But, the CWW stated, "I don't know because mom hasn't been evaluated."

Asked her opinion whether there was a substantial risk Tony would suffer serious physical harm or illness as a result of Jamie's inability or failure to supervise or protect him adequately, Cooper again testified that she did not know, explaining, "I would say there's a risk, but I don't know what kind of safeguards that she has, what kind of support systems that she has, how willing she is to continue in therapy." Asked again to clarify whether she saw the risk as high, low, substantial or slight, Cooper testified there was a "moderate risk." Asked if Jamie had a mental illness, Cooper responded, "No. Emotional disturbance, but not mental illness, no." Cooper testified that there was no evidence Jamie had a current active substance abuse problem but she believed there was a "moderate" level of risk due to Jamie being "in denial about substance abuse" and possibilities of relapse, and noted that Jamie had no "ongoing plan about the factors that cause her to use. No relapse prevention, no counseling." Cooper did not think Jamie would be receptive to informal supports if the court did not take jurisdiction because she had not been willing to provide information or engage in substance abuse counseling, she had only just said she was going to begin counseling, and she had not followed through with "everything offered to her before."

According to Cooper, the case plan called for parenting classes but Jamie had not presented documentation of having attended; Jamie testified that she had not been referred to any programs since Tony was taken into protective custody. Cooper believed classes would help Jamie learn what to expect from a child Tony's age: Cooper saw him as a typical rambunctious toddler but Jamie admitted being short with him verbally and cursing at him, and there were reports of her "perhaps inappropriately shoving him." Cooper stated that Jamie had not acknowledged lashing out at Tony physically and felt reports of her being physically abusive were exaggerated. She had concerns that Jamie would not arrange proper care for Tony because Jamie had not acknowledged that "what she did before was improper" and felt this posed a "moderate" risk of harm because Tony was a toddler requiring constant supervision to be kept safe. Cooper believed counseling would be helpful for Jamie because of the stress Jamie reported experiencing.

Cooper stated that she would be open to placing Tony with Jamie once she stabilized in an approved in-patient program. If the court found jurisdiction, the four main items that Cooper thought needed attention and would be part of the case plan were individual counseling for Jamie, to enable her "to focus on the child and some of her issues one at a time because, in my experience, she's sometimes all over the place," "[s]ome parenting with the child," "[s]ubstance abuse relapse prevention, since that's a possibility with her," and trying to secure a stable residence for Jamie and Tony. Cooper thought these were things that could be addressed within a family maintenance plan.

At the conclusion of the jurisdiction hearing, the father's attorney joined Jamie's in arguing the evidence did not support jurisdiction and further argued that the case was "an artifice of the grandmother and doesn't hold together." Counsel for the minor argued the evidence was sufficient for jurisdiction but not to support a removal order at disposition.[9]

---

[9] The Agency's argument focused on Jamie's lack of "relapse prevention support," counseling, stable housing, and parenting support and education, without which the Agency believed the combination of Jamie's history of substance abuse, verbal abuse of the child, feeling of being overwhelmed and "unstable present situation" constituted clear and convincing evidence that Tony would be at serious risk if placed with Jamie. Counsel for the minor maintained that Jamie put Tony at serious risk of harm by leaving him with without making proper arrangements for his care and was unable to provide the constant close supervision Tony needed because she was "stressed out and overwhelmed."

Jamie's counsel urged that Jamie acted appropriately in looking to relatives for support with Tony and gave Jessica instructions about appropriate places to take Tony after the water park, pointed to the police report indicating Tony's injuries appeared to be the result of normal play, and argued there was only speculation of current substance abuse and the allegations of verbal abuse were an insufficient basis for jurisdiction.

In arguing the case was an "artifice," counsel for the father stated, "Either grandma wanted the child because she felt she could protect it better than she fancied Jamie could or she wanted the tax deduction, which grandma admitted to and then downplayed on the stand. But there was something going on here." Casting Jamie's description of the trip to the water park as reasonable, counsel argued that Shirley's description was "a strange story and it needs to be resolved or it needs to at least be thought about as to what it means as to why these two versions are coming out the way

The court stated that it was concerned with Jamie's current mental status, and that "[a]lthough there has not been any evidence that she has a diagnosed mental disorder, the court finds that her current emotional status, her current emotional state of mind, does put her child at risk of suffering serious physical harm. [¶] The mother's under a lot of stress at this time. Given the amount of stress that she's under, given the evidence that the court has before it about her treatment of the child at least verbally and on one occasion physically, the court believes that it must take jurisdiction in this case." The court explained that "[o]ne of the things the court found somewhat compelling was the maternal grandmother's testimony about the incident in June where the mother called her apparently fairly distraught demanding that she come and pick up the child because she was overwhelmed. That combined with the fact that the mother admits to calling the minor certain names, names that both the grandmother and the mother admit to having occurred, just leaves the court with a feeling that at this point in time, the mother's emotionally overwhelmed and that this places the child at risk."

The court found the allegations of the petition true with a few modifications. In paragraph b-3, the allegation that Jamie left Tony with "related and unrelated adults" who did not provide proper supervision was modified to refer only to "related" adults, and the allegation that Jamie left Tony in the middle of the night was stricken. In paragraph b-4, the court struck the language stating that Jamie's history of substance abuse interfered with her ability to care for Tony, noting that there was no evidence Jamie currently had a substance abuse problem, but that she had a "fairly serious" history of substance abuse. The allegation under section 300, subdivision (g), was stricken because the father was no longer incarcerated.

---

they are." Counsel remarked on Shirley's telling the police she had no idea how to reach Jamie when the two had been in telephone contact daily before the water park incident and afterward and, noting the police report, asked, "why is grandma making these into big injuries, substantial danger to this child?"

Both parents' attorneys argued that the allegations concerning the father were not relevant because he was not raising the child.

The court took jurisdiction, continued the matter for disposition and ordered supervised visitation two days a week.

The Agency filed an addendum report on December 7, the day of the disposition hearing. Jamie had delivered the new baby by scheduled Caesarean section on November 19 and since the jurisdiction hearing had had five supervised visits with Tony and at least three counseling sessions. Jamie had contacted a provider to enroll in parenting skills classes that would begin in January and had stated she would be willing to participate in such classes through Terra Firma. She had an active referral to Terra Firma for relapse prevention, but as of December 3 had not contacted the provider. Jamie intended to continue living at her uncle's home in Hayward.

Cooper's interaction with Jamie had been "limited, primarily due to the mother's erratic behaviors. During some visits the mother is cooperative and other visits or telephone interactions she is combative and argumentative." Cooper had not "re-visited where the mother contends that she resides, as she reported that she would enter the hospital on 11/19/2015 to have a baby and remain hospitalized for approximately four days." Once released, Jamie began to call Cooper and "demand" her twice per week visits with Tony, and appeared "upset and histrionic when she did not get an immediate response" about her visits for the week of November 23. Jamie was also "agitated and combative" at the orientation for the Gathering Place, the visitation center. The father had been arrested on November 26 for drug related offenses and had been "sighted as a passenger in an automobile transporting the mother immediately after her supervised visit with the minor" on November 27, which raised concern "regarding the mother's interaction with [the father] and the minor's safety, given the previous history of domestic violence in the presence of the minor."

At the hearing on December 7, Jamie testified that she was a lot calmer since having given birth. She was living at her uncle's house, where she would be able to stay as long as she liked, and planned to stay until she was able to get a job and "get on my own." If Tony was returned to Jamie, the four other people living in the home would be able to help care for him and Jamie wanted to keep him in the day care he was currently

attending to avoid subjecting him to a drastic change; her uncles had said they would be able to help her with transportation for him.

Jamie still wanted to go to Shepherd's Gate but had been told by a staff member there that she would not be able to enter without Tony and later have him placed with her and she was not ready to do the whole program without him. She had enrolled in a parenting class scheduled to start on January 5 and had had three sessions with a counselor with whom she saw herself continuing. They had addressed grief counseling and Jamie had been "open" about her substance abuse history. They had not talked about relapse prevention as much as about Jamie's father's probate; Jamie stated that the first time she saw the counselor she was pregnant and the next was right after she had the baby, which was healthy, and she thought the counselor "didn't really think relapse was an issue." She had not enrolled in a relapse prevention program because she lost the phone number, had been busy with counseling, setting up appointments and visiting with Tony, and had been "really sick" and was still on medication due to complications with healing from her surgery. She was participating in NA but had not brought documentation of her attendance to court. She did not feel any desire to use currently but recognized that a relapse prevention program "wouldn't hurt" and believed all the classes she was offered were going to benefit her.

Regarding the report that she was upset about visitation during the week of Thanksgiving, Jamie explained that she called Cooper on Monday and again on Tuesday to arrange her two visits and did not get return calls, then called on Wednesday and was told she would not be able to visit because of the holiday; she was upset because she had not seen Tony for over a week and asked if she could at least have a two-hour visit, but the visit was cut short. Jamie testified that she was upset at the Gathering Place orientation because "they made it to appear to me that I wasn't going to get my son" and she had not been told this previously. Jamie denied the father having been in a car with her after a visit with Tony, testifying that one of the friends she was with, Conrad, had been mistaken for the father before because the two men looked a lot alike. She had last

seen the father on the last court date for which he was present, and he had left messages at the house inquiring about visits with Tony but she had not spoken with him.

Janelle P., who was in a long-term romantic relationship with the younger of the two uncles who lived at the house in Hayward, did not live at the house but was there almost every day as she cooked, cleaned and provided assistance for the older uncle, the homeowner. The homeowner had told her Jamie and Tony were allowed to remain at his house for as long as Jamie wanted. Janelle was willing to help care for Tony, including being able to care for him if Jamie was having emotional difficulty. She testified that Jamie had seemed a lot calmer since she gave birth.

The Agency continued to recommend out of home placement due to concerns about the stability of Jamie's housing, relapse prevention supports and mental health supports. County counsel acknowledged that Jamie had started counseling but commented that she had not contacted the agency that would address relapse prevention, that it was "unfortunate" she had not offered documentation of her NA attendance, and that she had stopped pursuing Shepherd's Gate and still believed there were two separate tracks for entrance when Cooper had confirmed with the program that there was only one waiting list

Counsel for the minor, Jamie and the father all argued that the Agency had not met its burden of showing a substantial danger to Tony by clear and convincing evidence. Acknowledging that Jamie's emotional stability was "of concern," counsel for the minor argued that Jamie had engaged in services, was in counseling, had been living in the same housing throughout the case and would be able to remain there. Jamie's counsel urged that Jamie had accomplished quite a bit since the last hearing despite having had to deal with the Cesarean section delivery and recovery, and that there were support people and a counselor in place. Counsel for the father argued that Jamie had addressed the court's concern with finding stable housing.

Expressing disappointment that Jamie was not "further along," the court found "clear and convincing evidence that the child must be removed from the custody of the mother [¶] . . . based upon the court's observations of the mother here on the stand. One

of the main concerns of the court when it found jurisdiction was the mother's emotional stability and I do not find that she is emotionally stable at this time. It is true that she has begun counseling services, but she has just had three sessions at this point and I don't believe that in the course of those three sessions so far she has dealt sufficiently with the issues that she has that the court observed at the last hearing." The court was "not convinced" about the stability of Jamie's housing, stating that it had hoped she would be in a facility like Shepherd's Gate or at least higher on the wait list, but it appeared she had chosen not to pursue the program, and that there was "no real evidence" Jamie had stable housing, only "hearsay from a person who doesn't live at the house" with nothing from the homeowner to substantiate it. The court also noted Jamie's failure to sign up for relapse prevention or supply proof of attending NA. The court concluded, "it would be inappropriate at this point to place the child with the mother. That may change over the course of time if she's able to get into a place like Shepherd's Gate. I believe that she needs that kind of stability to help her with the issues that she has."

Jamie filed a timely notice of appeal on December 15, 2015.

DISCUSSION

I.

The Agency asserts that Jamie's appeal must be dismissed for lack of a justifiable controversy because the jurisdictional findings as to the father give the court dependency jurisdiction over the minor regardless of any findings concerning Jamie. "[T]he minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. (*In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1553-1554; see 2 Cal. Juvenile Court Practice (Cont.Ed.Bar Supp. 1996) Initiating Dependency Proceedings, § 15.5, p. 13.) This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent. (See, e.g., *In re Malinda S.* (1990) 51 Cal.3d 368, 384.)" (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.)

Here, the father has not appealed and the Agency argues that Jamie "essentially waived her challenges to the allegations as to Father by concession" in the juvenile court. The Agency also contends Jamie lacks standing to raise issues that affect only the father's

interests and not her own. Jamie contests both points. We need not resolve them, however, because even assuming the findings as to the father are supported, we have discretion to address Jamie's appeal and find it appropriate to do so.

In re Drake M. (2012) 211 Cal.App.4th 754, 762 (*Drake M.*), rejected the argument that a father's appeal would have no practical impact on a dependency proceeding because unchallenged findings as to the mother supported jurisdiction. The court explained: " 'When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the [trial] court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.' (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) However, we generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal (see, e.g., *In re Alexis E., supra*, at p. 454); (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015; see *In re I.A.* (2011) 201 Cal.App.4th 1484, 1494); or (3) 'could have other consequences for [the appellant], beyond jurisdiction' (*In re I.A.*, at p. 1493 [not reaching the merits of an appeal where an alleged father 'has not suggested a single specific legal or practical consequence from this finding, either within or outside the dependency proceedings']])." (*Drake M.*, at pp. 762–763; *In re D.M.* (2015) 242 Cal.App.4th 634, 639; *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.)

Here, the jurisdictional findings as to Jamie are clearly the basis of the disposition order she also challenges: Both the order for out of home placement and the components of the case plan are based on the court's conclusion that Jamie's emotional issues, lack of stable housing and history of substance abuse, which were the underpinning of the jurisdictional findings, had not been sufficiently alleviated by the time of disposition. Indeed, because the father had not been involved in Tony's life for over a year when the

child was removed from Jamie, there would have been no basis for the court's involvement but for Jamie's conduct. To say that there is no need to entertain her challenge to the juvenile court's findings because the court had jurisdiction based on the findings as to the father, in this situation, would border on the absurd.

II.

" ' "The petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction." ' (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379.) 'The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.) [¶] . . . [¶] 'On appeal, the "substantial evidence" test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.] The term "substantial evidence" means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value.' (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) 'It is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. [Citation.] Under the substantial evidence rule, we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.' (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52–53.)" (*In re A.S.* (2011) 202 Cal.App.4th 237, 244.)

Jamie contends the evidence did not support jurisdiction under either of the two bases alleged under section 300, subdivision (b)—that she was not able to adequately supervise or protect Tony, or that she was unable to provide regular care for him *due to mental illness, developmental disability or substance abuse.* With respect to the latter prong of the statute, she correctly points out that there was no evidence she suffered from "mental illness," "developmental disability" or current substance abuse. The Agency did

not allege either mental illness or developmental illness, and the juvenile court expressly recognized there was no evidence she had a "diagnosed mental disorder" or a current substance abuse problem. The juvenile court's stated concern was Jamie's "emotional status" or "emotional state of mind," which the court believed put Tony "at risk of suffering serious physical harm." Jamie argues her "emotional issues"[10] cannot support a finding of "mental illness" and therefore do not suffice for a finding under the "inability to provide regular care" prong of section 300, subdivision (b). We need not resolve this point because, as we will explain, the evidence supports the court's finding of jurisdiction under the alternative "failure or inability . . . to supervise or protect" prong of section 300, subdivision (b), which does not have any required tie to "mental illness." Moreover, because the evidence of Jamie's emotional state and the risk it posed to Tony supported jurisdiction under the failure to protect prong of the statute, there is no reason to believe that the court erroneously based its order on the "failure to provide regular care" prong of section 300, subdivision (b), by improperly substituting "emotional condition" for "mental illness."

The court's explanatory comments make clear that it believed Jamie's stress and overall emotional state overwhelmed her, causing her to lash out at Tony at least verbally and fail to supervise him properly or make proper arrangements for his care. The court noted that "[o]ne of the things" it found "somewhat compelling" was Shirley's description of the incident when Jamie called her, "apparently fairly distraught demanding that she come and pick up the child because she was overwhelmed." That incident, combined with Jamie's admission of "calling the minor certain names" described by Shirley as well, "just leaves the court with a feeling that at this point in time, the mother's emotionally overwhelmed and that this places the child at risk." Jamie

[10] Jamie emphasizes that Cooper described Jamie having expressed being overwhelmed with "her own *issues*," including grief, housing, unplanned pregnancy, separation and isolation from family," and that when asked by the court whether she believed Jamie had a mental illness, Cooper replied, "No. Emotional disturbance, but not mental illness, no."

argues that the evidence showed she had "a very reasonable basis" for feeling particularly overwhelmed at the time of this incident—she was in the midst of the stressful experience of moving out of her apartment while caring for an active young child—and she handled the situation in an entirely appropriate way, by calling for help. This argument misses the point. The court was not concerned that on a single stressful occasion the mother of a young child called for help because she had run out of patience and energy. Shirley testified that Jamie called her "screaming and crying and telling me she couldn't take care of him anymore, she couldn't stand it anymore, that I better come get him," and that the call scared her and caused her to get Tony "immediately" because it sounded like Jamie "just snapped." This dramatic call for help, combined with Jamie's admission of calling Tony "certain names," which could only be a reference to her calling Tony "shit" or "shithead" and/or cursing at him[11]—painted a picture of a volatile situation, a mother overwhelmed with stress and on the proverbial "edge." The court was clearly concerned about what might happen if Shirley was not available to come to the rescue at a moment's notice.

Jamie, again quite correctly, emphasizes that "[p]erceptions of risk, rather than actual evidence of risk, do not suffice as substantial evidence." (*In re James R., Jr.* (2009) 176 Cal.App.4th 129, 137.) "[P]ossible harms that *could* come to pass" are "merely speculative"; there must be evidence of "a specific, defined risk of harm." (*In re David M.* (2005) 134 Cal.App.4th 822, 830.) " 'Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.' " (*In re A.S, supra,* 202 Cal.App.4th at p. 244, quoting *In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.)

[11] Shirley testified that she had witnessed Jamie yelling at Tony, cursing at him, and calling him "a little shit." Jamie denied this in her testimony, but the Agency's reports relate her having admitted "periodically [being] verbally abusive toward the minor, by calling him a 'shit-head.' "

We recognize that the court's phraseology—the evidence "just leaves the court with a feeling" that Jamie was overwhelmed and put Tony at risk—lends itself to Jamie's characterization. But this is not a situation where there is no evidence the parent's problems were affecting the child. In *David M., supra*, 134 Cal.App.4th at pages 825-826, for example, the dependency petition for two year old David and his newborn brother alleged that the mother used marijuana during pregnancy, had a history of substance abuse, failed to obtain appropriate prenatal care, had a history of mental illness and suffered from psychiatric disorders that rendered her incapable of caring for the children, that the father failed to protect the children and suffered from a mental disability that rendered him incapable of caring for the children, and that the mother's older child had been declared a dependent. The baby was born healthy and tested negative for drugs, and uncontradicted evidence showed David was healthy, well cared for, loved and being raised in a clean, tidy home. The court explained that there was no evidence of a "specific, defined risk of harm" to the children; speculation about possible harms was insufficient. (*Id.* at p. 830.) The court stated, "Whatever mother's and father's mental problems might be, there was no evidence those problems impacted their ability to provide a decent home for David." (*Ibid.*) Similarly, the court in *Drake M., supra,* 211 Cal.App.4th at pages 768-769, held the evidence did not support jurisdiction under section 300, subdivision (b), based on the father's marijuana use where there was no evidence it posed any risk of serious physical harm to the child, who was healthy and well cared for.

Here, the court's concern was obvious. Jamie was clearly under considerable stress from the combination of her father's suicide, legal issues concerning his estate, losing her housing, her unwanted pregnancy and issues with her maternal relatives. There was ample evidence that she was at times overwhelmed to the point she was unable to refrain from lashing out at Tony verbally, including the moving day incident Shirley described, reports of her yelling and cursing at Tony, and Cooper's report that Jamie admitted being periodically verbally abusive toward the child. Even without evidence of her having lashed out physically (a point to which we will return, *post*) the evidence

supported a finding that Tony was at risk of injury, if not due to an intentional act, due to loss of control in a sudden crisis such as the one Shirley described when Jamie was moving out of her apartment. The juvenile court "need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child." (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216.)

Further, the incident that led to the Agency's intervention demonstrated a serious lapse in judgment that clearly put Tony at risk: Jamie knew Jessica had a substance abuse addiction, had recently been released from jail and was homeless, and Jamie herself said she would not have left Tony with Jessica for more than a few hours or if Jessica had not been with Megan, the friend whom Jamie also knew. Although Jamie told a different story, the evidence supported finding that Jamie left Tony wearing a onesie, with no additional clothes or other provisions, and without a prearranged plan with the people she said she intended to assume care of the child after the water park excursion with Jessica. When Jessica eventually brought Tony to Shirley, she was not with Megan, the person who Jamie said had made her feel comfortable leaving Tony in Jessica's care, but rather with a man Shirley referred to as a "guy with a lot of tattoos." On both this occasion and Jamie's moving day, Shirley was in fact available to care for Tony, but Jamie had made no arrangement to assure this would be the case. Tony was less than two years old when taken into protective custody, a child of "such tender years that the absence of adequate supervision and care poses an inherent risk to [his] physical health and safety." (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824.)

We recognize that Cooper, when asked whether she believed there was a substantial risk that Tony would suffer serious physical harm or illness as a result of Jamie's inability or failure to supervise or protect him adequately, testified that she did not know and then, when pressed, characterized the degree of risk as "moderate." In initially stating she did not know whether Tony would be at substantial risk, Cooper explained that she did not think Jamie had begun to adequately address the mental health issues she had expressed involving her grief, housing problems, unplanned pregnancy and isolation from family, as Jamie had just recently started therapy and had not been

"evaluated." Cooper's testimony did not preclude the court from determining, based on her testimony along with the other testimony and reports, that Tony was at substantial risk of physical injury or illness due to Jamie's failure or inability to supervise or protect him adequately.

Jamie's emotional state was also tied to the court's concern with her history of substance abuse and lack of a relapse prevention plan. As we have said, the Agency did not allege that Jamie had a current substance abuse problem, and the court found there was no evidence she did.[12] This finding indicates that the court was not convinced by Shirley's testimony that Jamie had relapsed.[13] Instead, the court's concern was that,

---

[12] Jamie argues at some length that because she objected to portions of the Agency's reports under section 355, the court was precluded from relying solely upon statements in the reports about Shirley's speculation that Jamie's behavior indicated she had relapsed into substance abuse. Section 355, subd. (c)(1) provides that hearsay evidence in a social study, when specifically and timely objected to, "shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based" absent one or more exceptions, none of which appear to apply here. Respondent does not argue that any of the exceptions apply but maintains that Jamie waived her objection because, although Jamie filed written objections before the jurisdictional hearing to statements in the reports that she argued were made by an insufficiently identified reporter, consisted of hearsay and/or lacked foundation, the court did not rule on her written objections and she did not renew them when the reports were admitted into evidence. Having filed her objections under section 355, Jamie had no reason to object to admission of the reports. Section 355 limits the extent to which hearsay in a petitioning agency's reports may be relied upon exclusively but does not limit the admissibility of hearsay evidence (except for fraud, deceit or undue influence). (*In re B.D.* (2007) 156 Cal.App.4th 975, 983; *In re Lucero L.* (2000) 22 Cal.4th 1227, 1243.)

Jamie's objections under section 355 "meant that uncorroborated, the hearsay statements did not constitute substantial evidence and could not be used as the exclusive basis for finding jurisdiction under section 300." (*In re B.D., supra,* 156 Cal.App.4th at p. 984.) But this point is of little consequence because the juvenile court *rejected* the proffered evidence that Jamie currently had a substance abuse problem.

[13] Jamie argues that Shirley's credibility was questionable in that she appeared to be the reporting party or "closely aligned with" the reporting party because she knew CPS was coming to her house on July 29; "virtually all" the information given to the emergency CWW was provided by Shirley; and, in Jamie's view, Shirley was motivated

given Jamie's substance abuse history, her current over-stressed emotional state increased the likelihood she might relapse in the future. This was consistent with Cooper's assessment: She testified that her concern about current substance abuse had lessened since the beginning of the case and she did not think Jamie was currently using, but she was concerned because of Jamie's extensive past history. Jamie testified that she felt no urge to use substances and was attending NA meetings; both the CWW and the court appeared to distrust Jamie's account because she had not supplied proof of her attendance and both believed Jamie lacked and was in need of a relapse prevention plan.

The potential for a relapse, in this case, would not in and of itself support jurisdiction. Jamie undisputedly abused substances in the past. But "[w]hile evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M., supra,* 1 Cal.App.4th at p. 824.) Common sense might suggest that a past substance abuser is likely to relapse under stress, but there was no evidence before the court to support finding a *substantial* risk of relapse. Jamie had gotten herself clean when she decided to have a baby and had abstained from substance abuse through her pregnancy with Tony and since his birth. It was certainly *possible* she would relapse, but a speculative possibility is not substantial evidence. "Perceptions of risk, rather than actual evidence of risk, do not suffice as substantial evidence." (*In re James R., Jr., supra,* 176 Cal.App.4th at pp. 136–137.)

Nevertheless, it was reasonable to view Jamie's history of substance abuse and the potential for relapse as one of the reasons Jamie's emotional state presented a risk to Tony's safety. Jamie recognized that relapse was possible, and that a relapse prevention

---

by a desire to obtain custody of Tony. In addition to Jamie's testimony that Shirley had twice threatened to call CPS, had asked to claim him for tax purposes, and felt Jamie did not watch him properly, Jamie points out that Tony was placed with Shirley after being taken into protective custody and remained in Shirley's home thereafter. Jamie also suggests the initial emergency placement was unjustified because Shirley was not unwilling to continue to care for Tony and immediately accepted his placement with her.

program "wouldn't hurt." Considering her history of abuse and the constellation of stressors contributing to her emotional state, it was reasonable for the court to view relapse prevention as part of the support Jamie needed.

Similarly, Jamie's housing situation was linked to her emotional state: She herself described the loss of her own housing as one of the factors contributing to her "undue" stress. Like the history of substance abuse, the lack of stable housing alone would not have been a sufficient basis for jurisdiction. We see no evidence that Jamie's housing situation had caused or posed any risk of physical harm to Tony and respondent does not suggest any. Jamie and her son were not living on the street or even in a shelter, but in the homes of relatives and a friend. Respondent's assertion that that Shirley was unable to contact Jamie when Tony was in her care because Jamie lacked stable housing does not make sense. Shirley had difficulty reaching Jamie because Jamie did not have a cell phone, not because she did not sleep in the same house every night. Her lack of a cell phone would have presented the same problem if Jamie had been living in her own apartment but had no telephone there or happened not to be at home when Shirley called. But the evidence supported the factual finding that Jamie had not had stable housing since June 2015 in that after the loss of Jamie's apartment, she and Tony first stayed with the paternal grandmother and then stayed sometimes with Jamie's uncle in Hayward and sometimes with her friend in Fremont, and there was substantial evidence that this unstable housing situation contributed to Jamie's stress and the emotional condition that posed a risk to Tony.

Jamie contends that the juvenile court abused its discretion by failing to properly apply the law governing dependency jurisdiction and relying upon improper criteria in finding jurisdiction. "[a] discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order. [Citations.]" (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124–1125.) We have already rejected one of Jamie's arguments in this regard, that the court improperly found jurisdiction under the "failure to provide regular care" prong of section 300, subdivision

(b), based on her emotional state in lieu of the statutorily required "mental illness." Jamie additionally argues the juvenile court improperly relied upon its view that Tony was at risk of suffering emotional harm while section 300, subdivision (b), requires a risk of serious *physical* harm.

This argument is based on a statement by the juvenile court that is difficult to understand. After explaining its view that Jamie's emotional state put Tony at risk of "suffering serious physical harm" based on the evidence of the stress Jamie was under and her "treatment of the child at least verbally and on one occasion physically," and finding the factual allegations of the petition true as described above, the court stated, that it "believes that the Agency has provided evidence, preponderance of the evidence, that b-3 applies in this case, that the child is at risk of suffering serious emotional harm." The court's reference to "b-3" is perplexing. Section 300 does not have a subdivision (b)(3). The court could not have been referring to paragraph b-3 of the petition, as that paragraph had nothing to do with emotional harm; it described Tony being left with adults who did not provide adequate supervision in that the child sustained a bruise on his back reportedly from hitting his back against the stove while chasing someone. The court's reference to "serious emotional harm" suggests it was thinking of section 300, subdivision (c), which provides for jurisdiction when a child is suffering or at risk of suffering "serious emotional damage,"[14] and the court had questioned whether this provision applied in this case. But the petition did not allege section 300, subdivision (c), as a basis for jurisdiction, county counsel expressly disclaimed reliance upon it when

[14] Section 300, subdivision (c), provides, "The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. A child shall not be found to be a person described by this subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available."

questioned by the court,[15] and there was no evidence of the "emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior" required under this statute.

In any event, despite the court's statement about risk of serious emotional harm, it initially stated that it was finding Jamie's emotional state of mind put Tony "at risk of suffering serious physical harm" and, as we have discussed, that determination was supported by substantial evidence. The court's comments immediately following the statement we are discussing, which read as a further elaboration of the point, addressed Shirley's description of Jamie calling her in distress, to have Shirley take Tony because Jamie was overwhelmed—this incident, combined with Jamie's "calling the minor certain names," made the court believe that Jamie was "emotionally overwhelmed and that this places the child at risk." These comments relate to risk of physical, not emotional harm. In fact, it is not clear to us that the statement upon which Jamie's argument is based—the risk of "serious emotional harm" was not just a misstatement, considering that section 300, subdivision (c), refers to "serious emotional *damage*" while subdivision (b) of the statute refers to "serious physical *harm*."

We do not view the court's statement as an error of law or consideration of improper factors that would undermine its otherwise supported decision. The court clearly found that Tony was at risk of serious physical harm within the meaning of

---

[15] During counsels' arguments immediately preceding the court's ruling, the court asked whether section 300, subdivision (c), applied to this case. County counsel replied that it did not, stating that the Agency was "not taking the position that 300(c) applies. 300(c) would be primarily about emotional abuse or inability to manage the child's emotional needs and that is not the nature of the allegations here. [¶] This is mainly a failure to provide appropriate supervision, failure to protect and adequately supervise, failure to provide for the minor's daily needs by leaving appropriate plans in place and physical support. The diapers and clothing bag and so forth for him when she's left him with a family member that she knows has a history of substance abuse and is currently homeless." The court asked if Jamie's "verbal comments" were enough to constitute emotional abuse of the child, and county counsel reiterated that there was no allegation of emotional harm under section 300, subdivision (c). Jamie's attorney repeated that section 300, subdivision (b), required physical harm or a risk of physical harm.

section 300, subdivision (b), even if it also believed Jamie's conduct exposed the child to a risk of emotional harm.

With respect to the specific factual allegations of the petition, substantial evidence supported paragraphs b-1 and b-2 based on the Agency's reports, Shirley's testimony and Jamie's testimony. This evidence supported the conclusion that Jamie left Tony with a caretaker whose reliability even Jamie did not trust, without sufficient clothing or provisions, without making prior arrangements with Shirley or someone in the paternal uncle's household to care for the child after the water park excursion and without a means of reaching Jamie. That Jamie testified Shirley did in fact know how to reach her simply creates a conflict in the evidence that was within the juvenile court's province to resolve.

The facts alleged in paragraph b-3 are more problematic. Jamie did not dispute that she left Tony with her paternal great-uncle on July 26, 2015, and, when she picked him up, saw a bruise on his back that had not been there previously and the great-uncle said had been caused by Tony falling against the stove while playing. She argues, however, that these facts did not describe anything that posed a substantial risk of serious physical harm to Tony. The Agency alleged in paragraph b-2 that Shirley reported observing an "adult palm-sized bruise" when Tony was brought to her house on July 26. Asked where this description of the size of the bruise came from, Cooper testified that she recalled it being from Ludden's observation, not from a family member. This recollection is not consistent with Cooper's written report. A section of the detention report describing "presenting concerns" states, "It is reported that Tony has . . . an adult palm sized bruise on his back." In relating the chronology of the investigation, however, the same report states that when Ludden first met with Shirley she told him there was "a bruise" on Tony's back, that Ludden observed a "light" and "faded" bruise "slightly larger than a quarter," which the family said had been about the same size but darker when they first noticed it. The police report described the bruise as a "very faint small dime sized 'bruise' " that, like the "small [one-inch] scratch mark" on Tony's forehead, "did not appear to be anything more than when a child falls down while playing."

According to Jamie, the uncle said both the bruise and the small lacerations on Tony's forehead were sustained while playing. The sustained allegation that Jamie left Tony in the care of relatives who did not provide adequate care and supervision was based entirely on the bruise on Tony's back. This minor injury was insufficient to support a finding that Jamie left Tony with relatives who did not adequately care for and supervise him, much less that in so doing she exposed Tony to a substantial risk of serious physical harm.

The factual allegations of paragraph b-4 were supported by the Agency's reports, Shirley's testimony and Jamie's testimony. Jamie did not dispute that she had a history of substance abuse and drug-related arrests, entered a residential drug program in 2010, failed to complete the program, relapsed and was arrested in 2012. Nor did she dispute having consumed alcohol on July 4, 2015, although she testified she had only four sips of a beer. As to the "erratic behavior" referenced in paragraph b-4, Jamie does not argue that the behavior did not occur but that there was an alternative explanation for it—the undue stress she was experiencing due to the combination of factors we have discussed. As we have explained, the facts stated in paragraph b-4 would not *alone* support jurisdiction. But the facts themselves were supported by substantial evidence and were relevant to the juvenile court's determination that Jamie's emotional state posed a substantial risk of serious physical injury to Tony.

As we have also discussed, the facts alleged in paragraph b-5 concerning Jamie's verbal abuse of Tony were supported by the evidence. This paragraph also alleges that Jamie was seen kicking the child and threatening to strike him. The trial court relied upon the described physical conduct when it referred to her "treatment of the child at least verbally and on one occasion physically." The only evidence that Jamie had mistreated Tony physically or threatened to do so were the statements in the Agency's reports that Jamie "was seen kicking Tony, once on his side, for getting into her purse" and " 'pulling her hand back' and threatening to strike him." The statements appear in the detention and jurisdiction reports as part of emergency response CWW Ludden's report of matters reported to him by the unidentified "referral."

These statements in the Agency's report were unattributed multiple hearsay to which Jamie specifically objected under section 355. [16] As previously indicated (see fn. 12, *ante*), in light of Jamie's objection, section 355 precluded the juvenile court from relying upon uncorroborated hearsay in the Agency's reports as the exclusive support for "a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based." (§ 355, subd. (c)(1); *In re B.D., supra,* 156 Cal.App.4th at p. 984.) No evidence corroborated the reports' statement that Jamie had been seen kicking Tony; to the contrary, Shirley—who appears from the Agency's reports to have been the primary source of information—testified that she had not seen Jamie "kick in [Tony's] direction" or "being physical" with him.[17] Cooper—the author of the Agency's reports—testified only that there were reports of Jamie "perhaps inappropriately shoving him," thus indicating she did not necessarily believe the report that Jamie had been seen kicking the child or moving her hand as though to strike him.

The trial court did not violate section 355, however, because it did not rely upon the hearsay evidence that Jamie kicked or threatened to strike Tony as the *exclusive* basis for finding jurisdiction. These were among many facts alleged in the petition and, as we have said, the evidence would have been sufficient to support the court's jurisdictional finding that Tony came within the provisions of section 300, subdivision (b)(1), even without reference to any physical abuse. For the reasons described above, there was no substantial evidence to support the specific factual finding that Jamie kicked Tony or threatened to strike him, but this factual insufficiency does not undermine the juvenile court's ultimate conclusion.

---

[16] Jamie filed objections under section 355 to specific portions of the detention and jurisdiction/disposition reports, relating statements she argued were made by an insufficiently identified reporter, consisted of hearsay and/or lacked foundation. The Agency opposed the objections.

[17] Although the person who made the alleged observation was not identified in the Agency's reports, it is clear from the reports that Ludden's primary contact was with Shirley.

The factual allegations in paragraph b-6, concerning Jamie's lack of stable housing, were supported by the evidence as discussed above.[18]

III.

Jamie argues that even if the juvenile court's assumption of jurisdiction was supported, the dispositional order removing Tony from her care must be reversed. We agree.

"Section 361, subdivision (c)(1) limits the ability of the juvenile court to remove a child from the physical custody of his or her parents." (*In re A.E.* (2014) 228 Cal.App.4th 820, 825.) Jurisdictional findings are prima facie evidence the child cannot safely remain in the home (§ 361, subd. (c)(1)) and "the child need not have been actually harmed before removal is appropriate." (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146.) But in order to remove a child from a parent's physical custody, the juvenile court must find by clear and convincing evidence that " '[T]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor . . .' 'and there are no reasonable means by which the minor's physical health can be protected . . . .' This is a heightened standard of proof from the required preponderance of evidence standard for taking jurisdiction over a child. (§§ 300, 355, subd. (a); *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169, limited on other grounds in *In re Cindy L.* (1997) 17 Cal.4th 15, 31–35.) 'The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children.' (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525; see *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) 'Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt.' (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 695.)" (*In re A.E.*, at p. 825.)

[18] We need not address the factual allegations concerning the father, as the jurisdictional findings concerning Jamie are sufficient to support jurisdiction and the father did not appeal.

"The elevated burden of proof for removal from the home at the disposition stage reflects the Legislature's recognition of the rights of parents to the care, custody and management of their children, and further reflects an effort to keep children in their homes where it is safe to do so. (See *In re Jasmine G.*[, *supra*,] 82 Cal.App.4th [at p.] 288; see also *In re Henry V.*[, *supra*,] 119 Cal.App.4th at p. 525 ['The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children'].) By requiring clear and convincing evidence of the risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child's safety, section 361, subdivision (c) demonstrates the 'bias of the controlling statute is on family preservation, *not* removal.' (*In re Jasmine G.*, at p. 290.) Removal 'is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.' (*In re Henry V.*, at p. 525.)" (*In re Hailey T.*, *supra*, 212 Cal.App.4th at p. 146.)

"The standard for review of a dispositional order on appeal is the substantial evidence test. (*In re R.V.* (2012) 208 Cal.App.4th 837, 849.) In assessing this assignment of error on appeal, the substantial evidence test remains the appropriate standard of review, 'bearing in mind the heightened burden of proof.' (*In re Kristin H.* [(1996)] 46 Cal.App.4th 1635, 1654.) We consider the entire record to determine whether substantial evidence supports the juvenile court's findings. (*Ibid*.) 'Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt.' (*In re Isayah C.*[, *supra*,] 118 Cal.App.4th [at p.] 695.)" (*In re Hailey T.*, *supra*, 212 Cal.App.4th at p. 146.) "[W]e do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we review the record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the order. (*In re Isayah C.*, [at p.] 694.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)" (*In re Hailey T.*, at pp. 146–147.)

Here, the juvenile court pointed to three factors in explaining why it believed it would be inappropriate to return Tony to Jamie: Jamie's continued emotional instability, her lack of stable housing, and her failure to engage in or arrange for a relapse prevention program. The court felt it would be "inappropriate" to place Tony with Jamie because she had not sufficiently addressed the court's concerns. It did not, however, explain how Tony would be at substantial risk of harm in Jamie's care despite the supports Jamie could have been provided through family maintenance services.

The court's remarks at the disposition make clear that its primary concern was Jamie's emotional condition, just as it had been at jurisdiction. We must take the court's finding that Jamie was not emotionally stable very seriously, both because it is the fundamental issue underlying this case and because the court's assessment was based on its observation of Jamie in court. As we have said, we "do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence" but rather "review the record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the order. (*In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 694.)" (*In re Hailey T.*, *supra*, 212 Cal.App.4th at pp. 146–147.)[19]

Still, in reviewing dispositional findings, " ' "the substantial evidence test applies to determine the existence of the clear and convincing standard of proof. . . ." (*In re*

[19] Aside from the court's observation of Jamie on the stand, which it stated was the basis of its conclusion that she was not emotionally stable, Cooper reported that Jamie had been cooperative during some visits and telephone calls and "argumentative and combative" during others, had been "agitated and combative" at an orientation at the visitation center, and had been "upset and histrionic" when she had difficulty reaching Cooper to arrange visits for the week after she gave birth. Jamie testified that she had been upset at the orientation because "they made it appear" that she was not going to get Tony back and she had not previously been told this, and at her unreturned phone calls about visitation because she had not seen Tony in over a week due to her childbirth. It is, of course, difficult to judge from a cold record the degree to which Jamie's behavior was out of line for a mother distressed over her loss of custody of her child. (See *In re David D.* (1994) 28 Cal.App.4th 941, 952 [commenting on "Kafkaesque" distortion of viewing mother's distress over termination of parental rights as "selfish" prioritizing of her interests over children's].)

Amos L. (1981) 124 Cal.App.3d 1031, 1038.)' (*In re Basilio T., supra,* 4 Cal.App.4th at p. 170.)" (*In re Henry V., supra,* 119 Cal.App.4th at p. 529.) The evidence must be "so clear as to leave no substantial doubt" (*In re Hailey T., supra,* 212 Cal.App.4th at p. 146) that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor" and "there are no reasonable means by which the minor's physical health can be protected . . . ." (§ 361, subd. (c)(1).)

Here, one of the most significant factors contributing to Jamie's over-stressed emotional state had been relieved at the time of the disposition hearing – her unwanted pregnancy had ended and the baby had been adopted. As the disposition hearing was held only two weeks after Jamie gave birth, when she was still contending with complications in healing from her surgery, and considering her likely distress about the hearing itself, it would have been surprising if Jamie's emotional state was already dramatically improved, but the removal of the significant stress of the pregnancy was an obvious reason to expect gradual improvement. Moreover, Jamie had started counseling and liked her counselor. She thus had in place the critical support for dealing with her emotional issues generally, and in particular the ones Jamie had identified at the outset of the case—her continuing grief over her father's suicide and stress over legal matters concerning his estate.[20]

With respect to housing, the court was "not convinced" Jamie's situation was stable because it had no evidence from the uncle who owned the house to substantiate Jamie's and Janelle's testimony that Jamie was welcome to continue living there with Tony, and because the court believed Jamie needed the "kind of stability" offered by a program like Shepherd's Gate and had hoped Jamie would be living at or moving up the

[20] Jamie testified that in her sessions so far they had discussed grief counseling and her "whole life pretty much," focusing on the probate issues Jamie was involved in more than relapse prevention; Jamie believed the counselor was less concerned about relapse prevention because she saw the counselor first when she was pregnant and then immediately after giving birth to a healthy baby.

wait list for that program.[21] While a structured program might well have been the most beneficial situation for Jamie, the question for the juvenile court was whether her situation at the time of the disposition hearing demonstrated a lack of stable housing that (together with other circumstances in the case) posed a substantial risk of harm to Tony. Jamie was still living at her uncle's house, which Cooper had determined to be "adequate." Jamie and Janelle both testified that Jamie was welcome to remain there with Tony, and Jamie testified that she planned to do so until she was able to get a job and get out on her own. No evidence to the contrary was presented. The court's statement that it was not convinced the housing situation was stable because it had not heard assurance from the home owner that Jamie could stay inappropriately put the burden on Jamie to prove to the court's satisfaction that her housing was stable rather than requiring the Agency to prove it was not.

The court's concern regarding relapse prevention was that Jamie had not yet enrolled in a relapse prevention program,[22] as well as that she had not provided evidence

---

[21] Jamie testified that she had been told by a counselor at Shepherd's Gate that she had to enter and complete the program either by herself or with Tony but could not enter without him and later bring him into the program with her. When Cooper contacted the program, she was told it maintained only one wait list, not the separate "family" and "individual" lists Jamie described, and her understanding was that Jamie could enter the program without Tony. Cooper did not say, and was not asked in court, whether the program would allow her to assume custody of Tony later if she entered as an individual without him.

[22] The Agency characterizes Jamie as having failed to engage in a relapse prevention program "despite a direct order from the court," citing the Agency's statement in its addendum report for the disposition hearing that "[t]he court directed the mother to engage in a drug relapse prevention program." While the court clearly stated its view that Jamie needed relapse prevention services, the record does not reflect any actual order to the effect being made prior to disposition. At the end of the November 9 hearing, county counsel noted that "regardless of whether the ultimate order ends up being family maintenance or family reunification for disposition, the Agency's proposed case plan has been attached to the reports" and because of the short time reunification period due to Tony's age, requested an order for Jamie to begin cooperating with the Agency on the case plan, including housing, counseling support and substance abuse testing. The court stated that it believed Jamie needed therapy, parenting classes and relapse prevention

to substantiate her testimony that she was participating in NA. Jamie expressed willingness to engage in relapse prevention services. There was no evidence that Jamie had relapsed. During the four-week period between the jurisdiction and disposition hearings Jamie had been in the latest stage of pregnancy with a baby she was giving up for adoption, had undergone a cesarean section delivery with complications in recovery that persisted at the disposition hearing, had begun to attend counseling sessions, had enrolled in parenting classes, and had visited with Tony. Under these circumstances, her failure to have contacted the provider of the relapse prevention program is at least somewhat understandable. Even if Jamie was in some denial as to the need for such services—which she had recognized "wouldn't hurt" but may have felt were unnecessary given her testimony that she had changed her life, felt no urge to use and thought her counselor "didn't really think relapse was an issue"—there is no indication in the record that the court considered an alternative such as placing Tony with Jamie with a case plan requiring participation in and completion of a relapse prevention program by a specified date and close supervision of the home by the Agency. (See *In re Ashley F.* (2014) 225 Cal.App.4th 803, 811; *In re Henry V., supra,* 119 Cal.App.4th at p. 529; *In re Jeanette S.* (1979) 94 Cal.App.3d 52, 60.)

While Jamie was not "emotionally stable" at the time of the disposition hearing, a significant contributor to her emotional distress had recently been relieved and she was

---

services, but that it could not order drug testing because there was insufficient evidence of current substance abuse. County counsel stated, "We're actually not sure whether any of the contracted agency providers would do substance abuse counseling without a testing component. That would be a new type of case in my own experience, but we'll find out what we can do." The court said nothing further on the subject. After a brief, unresolved exchange about whether it was practical to have Jamie begin programs immediately with her cesarean section scheduled for two weeks later, the court set a date for disposition, ordered visitation and directed Jamie, "It's incumbent upon you to cooperate with the Agency, to give them all the information that they request of you so that the court can make a decision as to whether or not you're going to get custody of your child or whether . . . the child's going to remain out of your custody. [¶] So I understand that this is an emotional situation with you, but you need to take hold of your emotions so that you can do what is going to be best for your child."

engaged in counseling to support her in dealing with the issues that were causing her difficulties. There was no evidence of current substance abuse. Jamie expressed willingness to participate in relapse prevention services although she had not yet arranged to do so. She was living in a home that the CWW deemed "adequate," with other adults available to help care for Tony if needed, where she planned to remain until she found a job and became able to be self-sufficient. She had arranged to attend parenting classes that were to begin the next month and was willing to pursue such classes through a different provider as an alternative.[23]

In light of these changes in Jamie's circumstances, and considering that despite her emotional state and poor exercise of judgment in the past Tony had not been seriously harmed, we fail to see how the evidence here can be seen as establishing the "high probability" of harm necessary to support an order removing Tony from Jamie's custody. As we have said, a removal order required the court to find clear and convincing evidence that there would be a "substantial danger" to Tony's "physical health, safety, protection, or physical or emotional well-being" if returned to Jamie *and* that there were "no reasonable means" by which his physical health could be protected without removal. (§ 361, subd. (c)(1).) The juvenile court did not even explore the possibility of providing the support and services Jamie required through a family maintenance plan—despite Cooper having testified at the jurisdiction hearing that Jamie's need for individual counseling, parenting assistance, substance abuse relapse prevention and stable housing could be addressed with a family maintenance plan. No evidence was presented at disposition to suggest family maintenance services would be insufficient to protect Tony.

"A dispositional order removing a child from a parent's custody is 'a critical firebreak in California's juvenile dependency system' (*In re Paul E.* [(1995)] 39 Cal.App.4th [996,] 1003), after which a series of findings by a preponderance of the

[23] In the Agency's addendum report, Cooper stated that she "has no information that the mother has contacted" the second provider, and Jamie was not asked about this at the hearing.

evidence may result in termination of parental rights. Due process requires the findings underlying the initial removal order to be based on clear and convincing evidence. (*Id.* at p. 1001; *Cynthia D. v. Superior Court* [(1993)] 5 Cal.4th [242,] 253–255.)" (*In re Henry V., supra*, 119 Cal.App.4th at p. 530.) The evidence in this case does not rise to this level.[24]

IV.

At the outset of this case, when interviewed by Ludden on July 30, Jamie reported that she might have Cherokee Indian ancestry on the paternal side of her family and that she was not a registered tribe member. An ICWA-010(A) form was completed indicating that Tony might have Indian ancestry.

On September 22, 2015, the Agency filed an ICWA-030 form showing that notice of the jurisdiction/disposition hearing set for October 2, 2015, had been served on three Cherokee Indian tribes, the Bureau of Indian Affairs (BIA) and the United States Department of the Interior. The form notice provided spaces to supply name, current and former address, birth date and place, tribe or band, membership or enrollment number, and death date and place if applicable, for the child's mother, father and each of the maternal and paternal grandparents and great-grandparents. Here, the Agency supplied

[24] Jamie asks that this case be remanded for proceedings before a different judge because the judge who presided over this case "appeared to be biased against her." She cites *Guardianship of Vaughan* (2012) 207 Cal.App.4th 1055, in which grandparents sought guardianship over children who had been in their care for some 15 months at the request of the mother, who had voluntarily entered a mental health facility. The trial court failed to apply a presumption that would have favored continued placement of the children with the grandparents because it erroneously believed the presumption applied only if the children had been "abandoned." Remanding for proceedings under the correct legal standard, the appellate court ordered further proceedings to be held before a different trial judge "in the interest of justice." (*Id.* at p. 1074.) Jamie's request for proceedings before a different judge is based on her view that the judge here applied improper standards by substituting her emotional condition for "mental illness" in finding jurisdiction and erroneously basing its decision on emotional rather than physical harm to Tony. We have rejected both of these arguments and see no grounds for finding the judge was biased against Jamie.

Jamie's name and date of birth; the father's name and address in jail; Shirley's name and address; Jamie's father's name, date and state of birth, and date and city of death; one maternal great-grandmother's name; and one maternal grandfather's name and address. For the rest of the information requested on the form, the Agency responded "no information available" or "unknown." The same information was sent to the same recipients on October 9 as notice of the hearing that had been continued to October 9.

The United Keetoowah Band of Cherokee Indians in Oklahoma responded that "[w]ith the information you supplied us," a search of enrollment records revealed no evidence Tony was descended from anyone on the Keetoowah Roll. The Eastern Band of Cherokee Indians responded that "based on the information received from you," Tony was neither registered nor eligible to register as a member of the tribe. The Cherokee Nation responded that "based on the information exactly as provided by you," Tony did not "meet the definition of 'Indian child' in relation to the Cherokee Nation." Its letter cautioned that "[a]ny incorrect or omitted information could invalidate this determination" and stated that a finding of eligibility for enrollment would require the full names and dates of birth for the "direct biological lineage linking the child to an enrolled member of the tribe." The letter specified as missing information the birth dates of the father, Shirley, the maternal great-grandmother, and the maternal great-grandfather.

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. § 1901 et seq.; *In re Holly B.* (2009) 172 Cal.App.4th 1261, 1266.)" (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.) "An ' "Indian child" ' is an unmarried person under 18 who is either a member of an Indian tribe or is eligible for membership and is the biological child of a tribe member. (25 U.S.C. § 1903(4).)" (*In re W.B.* (2012) 55 Cal.4th 30, 49.)

"If there is reason to believe a child that is the subject of a dependency proceeding is an Indian child, ICWA requires that the child's Indian tribe be notified of the proceeding and its right to intervene. (25 U.S.C. § 1912(a); see also Welf. & Inst. Code,

§ 224.3, subd. (b).) [¶] 'Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the state court proceedings. Without notice, these important rights granted by the Act would become meaningless.' (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)" (*In re A.G., supra,* 204 Cal.App.4th at p. 1396.) "The burden is on the Agency to obtain all possible information about the minor's potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA." (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630.) "Because of their critical importance, ICWA's notice requirements are strictly construed. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.)" (*In re A.G.,* at p. 1397.) And because notice serves the interests of Indian tribes, ICWA notice issues are not forfeited by a parent's failure to raise the issue in the juvenile court. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 296-297; *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1435.)

"[F]ederal and state law require that the notice sent to the potentially concerned tribes include 'available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.' (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; see *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.)" (*In re A.G., supra,* 204 Cal.App.4th at p. 1396; § 224.2, subd. (a)(5)(C).) The Agency "has an affirmative and continuing duty to inquire about, and if possible obtain, this information. (*In re S.M.* (2004) 118 Cal.App.4th 1108; § 224.2, subd. (a)(5)(C); 25 C.F.R. § 23.11(d)(3); [Cal. Rules of Court,] rule 5.481(a)(4).) Thus, a social worker who knows or has reason to know the child is Indian 'is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph

(5) of subdivision (a) of Section 224.2 . . . .' (§ 224.3, subd. (c).)" (*In re A.G.*, at p. 1396; *In re C.Y.* (2012) 208 Cal.App.4th 34, 39.)

" 'The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation]. We review the trial court's findings for substantial evidence. [Citation.]' (*In re E.W.* (2009) 170 Cal.App.4th 396, 403–404.)" (*In re Christian P.* (2012) 208 Cal.App.4th 437, 451.) "Substantial compliance with the notice requirements of ICWA is sufficient." (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566.) "[W]here notice has been received by the tribe, . . . errors or omissions in the notice are reviewed under the harmless error standard." (*In re E.W.*, at pp. 402-403.)

Here, the Agency recognized that Jamie's statement that she might have Cherokee ancestry on the paternal side of her family was enough to trigger the ICWA notice requirement, and the notice provided identifying information for Jamie's father. But it provided no information whatsoever about Jamie's paternal grandparents, any of whom could potentially have been the link to the ancestry she mentioned. This was information the Agency was required to include in the notice if available. (*In re A.G., supra*, 204 Cal.App.4th at p. 1396; § 224.2, subd. (a)(5)(C).) It seems obvious that at least some of the information sought on the notice form—Jamie's paternal grandparents' names, addresses, dates and places of birth and death—might be known to Jamie, her paternal uncles or even Shirley, who had been married to Jamie's father and, according to her testimony, had known the paternal uncle since elementary school. Jamie and Shirley were in direct contact with Cooper and at least some of her paternal relatives were presumably accessible to the Agency since Jamie was living with two of her paternal uncles. The record gives no indication the Agency made any attempt to obtain information about the paternal great-grandparents from these obvious sources despite the Agency's statutory obligation to " 'make further inquiry regarding the possible Indian status of the child . . . by interviewing the parents . . . and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2 . . . .' (§ 224.3, subd. (c).)" (*In re A.G.*, at p. 1396.)

The Agency's suggestion that the Agency had no obligation to make further inquiry because Jamie said she was not a "registered tribe member" is incorrect. " 'Each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria. [Citation.] Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership. [Citation.]' (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1300.) ' "Enrollment is not required . . . to be considered a member of a tribe; many tribes do not have written rolls. [Citations.] While enrollment can be one means of establishing membership, it is not the only means, nor is it determinative. [Citation.] . . ." . . . Moreover, a child may qualify as an Indian child within the meaning of the ICWA even if neither of the child's parents is enrolled in the tribe. [Citation.]' (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)" (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 207–208.) That Jamie was not a "registered" tribe member did not necessarily resolve the question whether Tony was eligible for membership. (*Id.* at p. 208.) " '[P]arents are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe and those of each other. [Citation.]' (*In re Kahlen W., supra,* 233 Cal.App.3d at p. 1425.)" (*Dwayne P.*, at p. 257.) " '[O]ne of the primary purposes of giving notice to the tribe is to enable the *tribe* to determine whether the child involved in the proceedings is an Indian child. [Citation.]' (*In re Desiree F.* [(2000)] 83 Cal.App.4th [460,] 470, italics added.)" (*Dwayne P.*, at pp. 254–255.)

In *In re A.G., supra,* 204 Cal.App.4th at page 1397, the father reported that he was or might be affiliated with certain tribes, the spaces on the ICWA notice form for information about relatives other than the mother and father were marked " 'No information available' or left blank," and the Agency's reports did not reflect any efforts to investigate the child's Indian heritage. After noting that there was no indication the Agency followed up on the father's statement that he was gathering information about tribal affiliation and would let the social worker know when he had more, the court stated, "Nor, apparently, was any effort made to interview any of Father's immediate or extended family members about A.G.'s Indian heritage. These failures are all the more

puzzling because several of Father's family members, including his mother, his brother, an aunt and a great-aunt were involved in the proceedings and/or in contact with the Agency. Yet there is no indication that the Agency interviewed them about A.G.'s Indian heritage . . . . Error is obvious." (*In. re A.G.*, at p. 1397.) So it is here.

The tribes' responses stating Tony was not eligible for membership do not render the error harmless. The responses made clear that they were based exclusively on the information provided in the Agency's notice. That information, at least without further explanation of the Agency's efforts, was insufficient. Neither the court nor the Agency "is required to conduct a comprehensive investigation into the minors' Indian status. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1161; *In re Levi U.* [(2000)] 78 Cal.App.4th [191,] 199 [no duty to 'cast about' for information].)" (*In re C.Y., supra*, 208 Cal.App.4th at p. 39.) But the Agency must attempt to obtain information about Jamie's paternal great-grandparents or other paternal relatives, at a minimum by interviewing extended family members. If the missing information can be obtained, the Agency must provide corrected ICWA notices to the relevant tribes; if the information cannot be obtained, the Agency must inform the juvenile court of its unsuccessful efforts.

We will not reverse the jurisdictional order at this juncture, as there is not yet a sufficient showing that Tony is an Indian child within the meaning of ICWA. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199.) "If after proper inquiry and notice a tribe determines Damian is an Indian child, the tribe, a parent or Damian may petition the court to invalidate an action of placement in foster care or termination of parental rights 'upon a showing that such action violated any provision of sections [1911, 1912, and 1913].' (25 U.S.C. § 1914.)" (*In re Damian C.*, at pp. 199-200.)

V.

Jamie is concerned that the Agency may have referred her to the Department of Justice (DOJ) for inclusion in the Child Abuse Central Index (CACI) based on one or more of the allegations of the petition. She asks this court to direct the juvenile court to

direct the Agency to notify the DOJ that any listing relating to a jurisdictional finding reversed in this case must be removed from CACI.

Under the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq. (CANRA)), Penal Code section 11169 requires specified agencies to forward to the DOJ "a report in writing of every case it investigates of known or suspected child abuse or severe neglect that is determined to be substantiated, other than cases coming within subdivision (b) of Section 11165.2."[25] Jamie's concern is that the allegations here could be construed as coming within the statutory definition of "severe neglect," which includes situations in which a person with care or custody of a child "willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered." (Pen. Code, §§ 11165, subd. (a), 11165.3.)[26]

Jamie does not affirmatively state that her name has been placed on CACI, a matter of which she should have knowledge because at the same time an agency forwards a report to the DOJ under Penal Code section 11169, subdivision (a), it is required to provide written notice to the "known or suspected child abuser that he or she has been reported to [CACI]." (Pen. Code, § 11169, subd. (c).) Jamie is also entitled to inquire of the DOJ whether she is listed on CACI. (Pen. Code, § 11170, subd. (f).) In response to our inquiry, respondent has represented that "the allegations that would have prompted

---

[25] Section 11165.2, subdivision (b), addresses negligent failure to provide adequate food, clothing, shelter, medical care or supervision where there has been no physical injury to child.

[26] Penal Code section 11165.2, subdivision (a), describes " '[s]evere neglect' " as including "situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by Section 11165.3, including the intentional failure to provide adequate food, clothing, shelter, or medical care." Penal Code section 11165.3 provides that " 'the willful harming or injuring of a child or the endangering of the person or health of a child,' means a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered."

the Agency's reporting obligation were found inconclusive, and therefore were not reported pursuant to Penal Code section 11169, subdivision (a)."

The inclusion of an individual on CACI results from an agency's investigation and determination that a case of abuse or severe neglect, as defined in CANRA, is substantiated. (See Pen. Code, § 11165.12.)[27] "If a report has previously been filed which subsequently proves to be not substantiated, the [DOJ] shall be notified in writing of that fact and shall not retain the report." (Pen. Code, § 11169, subd. (a).) The juvenile court has no role in this process, and the definitions in CANRA are not identical with the definitions of conduct that support dependency jurisdiction under section 300. For example, where the basis of a report is a parent's causing or permitting the child's person or health to be endangered, CANRA requires that the parent's act or omission be willful. (Pen. Code, §§ 11165.2, subd. (a), 11165.3.) Dependency jurisdiction based on a parent's putting the child at risk of physical injury under section 300, subdivision (b), does not require willfulness on the part of the parent but does require that the child be at risk of serious physical injury. Thus, a juvenile court's jurisdictional determination may or may not resolve the same issues as an agency's determination that a case of neglect has been substantiated.

In short, because the CANRA procedure operates independently of juvenile court dependency proceedings, there would be no basis for us to provide the relief Jamie seeks even if it were clear that her name had been reported to the DOJ. The avenue of redress for a person wishing to challenge his or her listing on CACI is to first seek an administrative hearing, as provided in Penal Code sections 11169, subdivisions (d) and

[27] A "substantiated report" is one "that is determined by the investigator who conducted the investigation to constitute child abuse or neglect, as defined in Section 11165.6, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred. A substantiated report shall not include a report where the investigator who conducted the investigation found the report to be false, inherently improbable, to involve an accidental injury, or to not constitute child abuse or neglect as defined in Section 11165.6." (Pen. Code, § 11165.12.)

(e), and then, if necessary, a writ of administrative mandamus. (*In re C.F.* (2011) 198 Cal.App.4th 454, 464-465.)

DISPOSITION

The true finding as to paragraph b-3 of the petition is reversed. The allegations of this paragraph shall be stricken.

Paragraph b-5 of the petition shall be modified to delete the second and third sentences concerning observations of the mother kicking and threatening to strike the child.

With these modifications, the jurisdictional findings and orders are affirmed.

The dispositional orders are reversed.

The matter is remanded to the juvenile court with directions to modify the sustained petition and jurisdictional orders as stated above and order the Agency to provide corrected ICWA notice or report to the court on its efforts to obtain further information as discussed herein, and for further proceedings on disposition in accordance with the views expressed in this opinion.

_____
Kline, P.J.

We concur:

_____
Richman, J.

_____
Miller, J.

In re Tony M. (A147134)